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No. 97-1230

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In The

Supreme Court of the United States

October Term, 1997

CITY OF WEST COVINA,

Petitioner,

v.

LAWRENCE PERKINS; CLARA PERKINS; APRIL PERKINS, a minor, by and through LAWRENCE PERKINS,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Whether due process requires that the written notice left by police officers when taking property from a residence pursuant to a search warrant include the information necessary to enable an innocent property owner to utilize the state procedure for return of the property.

Whether due process requires that the written notice left by police officers, under the circumstances presented in the record, also include the information necessary to enable the property owner to identify the procedure to obtain return of the seized property.

PARTIES TO THE PROCEEDING

Petitioner's Brief on the Merits accurately lists the parties to the proceeding in the Courts below. However, the issues presented do not involve April Perkins, the minor.

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STATEMENT OF THE CASE

A. Introduction.

At issue in these proceedings is the constitutional adequacy of notice given to Respondents after the seizure of property from their home during the execution of a search warrant. Pet.App. A17. Pursuant to a policy of the City of West Covina, their police officers, after having served a search warrant on Respondents' unoccupied residence, left a form "Search Warrant: Notice of Service" document which provided only limited information regarding the seizure of the property. J.A. 76-77. The officers left the notice pursuant to a standard practice, custom, or policy of the City. Pet.App. A13. The document gave notice that, on May 21, 1993, the residence had been searched by the West Covina Police Department, pursuant to a warrant signed by Judge Oki on May 20, 1993. The notice also identified the name and phone number of the lead detectives. Pet.App. A17-18. The officers also left an inventory of the property taken. *Penal Code* 1535. The officers did *not*, however, leave a copy of the search warrant (which includes the identifying search warrant number), as most other states and federal law require. Neither did the officers leave any other information which would allow the Respondents to identify their property. As a consequence, Respondents were denied an opportunity for a hearing to seek return of their property.

B. Facts

1. Respondents live at 531 Balham Street in the City of West Covina, the location of the execution of the search warrant. Lawrence and Clara Perkins purchased their

home in 1990, for approximately $100,000.00. Lawrence is currently a machine operator at United Stationers and has been employed there since 1985. J.A. 103. Clara also a machine operator, has worked at Stanley Hardware for over 22 years. J.A. 127. Their daughter, April Perkins, is ten years old and in the fourth grade. Prior to the time of the events which led to the procurement and execution of the warrant, the Perkins had a boarder, Marcus Marsh, stay in their home. After Mr. Marsh had moved out, and completely unknown to the Perkins family, he became the subject of a murder investigation, which led to the search of the Perkins' home. Excerpts of Record before the Court of Appeals, C.R. 19 at pp. 13-21 and 27:23 to 28:1. All of the events relevant to the procurement of the warrant occurred after the time Marsh had moved out of the residence. However, because Marsh had previously identified the Perkins' household as his place of residence, the police department procured a search warrant for that and other locations in furtherance of its investigation. Excerpts of Record before the Court of Appeals, C.R. 19 at pp. 13-21 and 23-25.

2. The search of the Perkins' home occurred on the morning of May 21, 1993, after Respondents had taken their daughter to school and left for work. During the search of the home, in a locked bedroom, separate from the bedroom previously occupied by Marsh, officers found and seized a 12-gauge shotgun registered to Lawrence Perkins, numerous other items of personal property, Lawrence Perkins' adoption papers, and $2,469.00 in cash – money saved by the family for a trip by Mrs. Perkins, her child and grandchildren (from a previous marriage) to visit Mrs. Perkins' mother in Alabama. J.A.

84; 109-110; 128. In that same bedroom, telephone directories were found in the name of Lawrence Perkins and Clara Perkins. J.A. 84. No items were found which linked Marcus Marsh to the bedroom. Most of the items were seized pursuant to the terms of the warrant; the money was seized under the plain-view doctrine.

Later that day, Mr. Perkins returned from work to find his home in disarray. Upon investigation, Mr. Perkins found the form "Search Warrant: Notice of Service" and receipt for property taken left by the officers. J.A. 106-107. Mr. Perkins immediately called the one telephone number listed on the notice. J.A. 113. The number connected with Petitioner's police station, and Mr. Perkins spoke with Detective Ferrari to set up an appointment. *Id*. When the family went to the station, however, they were informed that Detective Ferrari had already left for the day and would not be back until the following Monday. J.A. 114.

3. On that following Monday, the family returned to the station and met with Detective Ferrari. J.A. 115. At that meeting, according to Respondents, Detective Ferrari, stated that, while no one in Respondents' home (presumably the family) was implicated, his house was potentially "involved" in a robbery and homicide investigation. J.A. 116. The detective and Respondents spoke about the service of the warrant, at which time Mr. Perkins requested that his property be returned to him. *Id*.

The record is unclear as to the specific order of events; however, at some point, Respondents showed Ferrari proof of ownership of the property, and Ferrari

indicated he had no objection to its return. At some point, Respondents went back to the police station to speak with the property department representative at the direction of Detective Ferrari. J.A. 117. At the station, Perkins was told by the "guy that [he] was supposed to talk to," that Detective Ferrari "wanted to see [him]." J.A. 117; 131; 104-05. During this conversation, the detective asked Respondents to testify against Marsh regarding a conversation Respondents allegedly had with Marsh at their kitchen table. If they cooperated, Ferrari said, Perkins "would get his stuff back." J.A. 117; 119. Ferrari "never did [tell Perkins] what the discussion was [purportedly] about." J.A. 119.

The record is confusing on these points, because Ferrari appeared to be operating under the assumption that Respondents knew something about the crime, when, in fact, they did not. According to Respondents, the Detective was, at best, simply not providing the factual information (the search warrant number or case name) he needed to access the courts, or, at worst, taking advantage of Respondents' persistence by attempting to leverage information from them for the Marsh criminal investigation after giving false information to lure him back to the police station. J.A. 117-121, 103-104. Ferrari, at some point, however, did tell Lawrence Perkins to go to the court to get an order releasing the property. J.A. 123. Perkins later complained to Lt. Schimanski about Detective Ferrari. Lt. Schimanski told Perkins that Ferrari "had no right telling [him] that [he] could come get [his] belongings. J.A. 104.

Overall, the record shows that Perkins talked to the detectives in the case on several occasions, J.A. 103-05;

113-16, and appeared at least twice at the police station, J.A. 39; 113-16, once with proof of ownership, J.A. 130, the second time, he thought, to get his property back. *Id.* After Respondents established ownership over the property, confirmed that they knew nothing about the events that led to the procurement of the warrant, and verified they had no information to the police, the detectives informed Perkins of his need to get a "court order." J.A. 122-124. Mr. Perkins, thereafter, went to the courthouse to attempt to obtain the return of his wrongfully seized property. J.A. 122.

4. At the courthouse, Perkins talked to various courthouse personnel. J.A. 123-124. When he encountered difficulty, Perkins sought "further information" from the detectives. According to Ferrari, after a "second meeting," Mr. Perkins "continued to call back because he had some problems with getting a court order." J.A. 130-31. Perkins was unable to get on calendar before a judge to seek return of his property. In fact, Ferrari corroborates Respondents' testimony that Mr. Perkins was hitting successive dead-ends. Ferrari states that Mr. Perkins was told that he could not get into court without a number related to the Search Warrant. J.A. 39-40; 122-124; 77-78. Ferrari stated that Mr. Perkins twice went to court; he remembers that Mr. Perkins "initially came back" and said he could find no case filed at the court. J.A. 130-131. Subsequently, and after he had been back to court, Respondents told Ferrari that they had tried to contact Judge Oki, but he was on vacation. *Id.* Perkins tried to see other judges but was told he could not "get on calendar" without the warrant, case number, or other identifying information. J.A. 124-132.

According to Ferrari, there was no case number, because no case had been filed, and no available search warrant number, because the warrant had been sealed. J.A. 39-40.

During this time, it is established that the problems Respondents encountered were a result of their not having the necessary information, i.e., the search warrant number, or case name or number, to even be allowed by the clerk's office to get into the courtroom. J.A. 131-132, 123-124.[1] Mr. Perkins' efforts were not thwarted for lack of effort, but because he was not given notice of the necessary information with which to seek recovery of his property, much less notice of the procedure to be invoked. J.A. 122-124.

Eventually, almost a year after the incident, Respondents' property was returned to them, but only after Petitioner filed a Request for Return of Property utilizing

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[1] Defendant Ferrari claims that "to his knowledge" the warrant number was available to the public. This weak and speculative evidence of a belief is insufficient in light of Mr. Perkins' testimony and the testimony of Jeffrie Madland. J.A. 77-78. Ferrari has testified that he provided [Mr. Perkins] with the number of the search warrant which he could use in identifying the search warrant with Judge Oki when he requested the return of his property. J.A. 46. This testimony is consistent with Perkins' statement that Ferrari gave him numbers on a couple of occasions, which turned out to be wrong. J.A. 123. *However*, Ferrari's declaration is inconsistent with his testimony that the search warrant was sealed. Further, the testimony of Respondents' witness supports Perkins' claim that he would be unable to get his property back from the court without the proper information which was only in the custody of Petitioner and the court. J.A. 77-78.

the previously unidentified case number assigned the criminal filing against Marcus Marsh and the previously sealed search warrant number. That criminal case was not filed until February 9, 1994, nearly nine months after the seizure.[2]

C. Procedural History

The District Court granted summary judgment on Petitioner's claim that there existed an adequate post-deprivation procedure for the return of unlawfully seized property and that Respondents waived the remainder of their due process claim by not invoking the statutory procedure for return of property. Pet.App. E.[3] The Ninth

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[2] The filing date of the criminal action is not a part of the record at this time. Respondents request that the court take judicial notice of this fact.

[3] Contrary to the assertion in Petitioner's Brief on the Merits, Respondents' procedural due process claim was alleged. The district court considered the Motion to Amend by Respondents, and ruled, that "the Due Process issue is bifurcated and not part of this phase of the trial." Pet.App. D2. Moreover, on the limited remand order by the Ninth Circuit requesting "clarification of the status of the bifurcated claim," the district court was given the opportunity "to conduct such further proceedings as it may deem necessary to determine the status of the due process claim. . . . " Pet.App. D2. On remand, the district court, confirmed that the claim was viably alleged when it stated that "such claim in fact was not resolved during the prior proceedings . . . " Pet.App. E2. The district court then ruled on the merits of the claim. Pet.App. E.

Respondents should not be prejudiced by the court's decision not to issue a written order granting the motion to amend. This particular district court enforces a procedure widely known as the "rocket docket," which sometimes

Circuit affirmed the District Court's ruling on the adequacy of the postdeprivation remedy but reversed the District Court's finding that Respondents' waived their due process claim. The Court of Appeals found that the notice provided by the City was constitutionally inadequate, *"in circumstances such as those presented by this record."* The Court of Appeals found that the notice denied the Perkins' family basic information with which to obtain return of their erroneously retained property.

SUMMARY OF ARGUMENT

Notice is a fundamental component of due process, regardless of the pre or postdeprivation character of a case. The United States concedes that notice is required under the circumstances presented in the record. The Petitioner does not. The case law amply supports the mandate of notice in a postdeprivation context. Where there is no opportunity for a predeprivation hearing or notice, the necessity of adequate postdeprivation notice is compelling. The notice must include the fact of the seizure, the key information about the seizure to access the procedure for securing return of property, and the means for securing the return of property. The need for notice of the seizure itself is fundamental, as the United States concedes. The need for the basic information to identify the property is also clear, for without it, the postdeprivation procedure is meaningless. Finally, the need for notice

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sacrifices formality for efficiency. See *Martel v. County of Los Angeles*, 56 F.3d 993 (9th Cir. 1995).

of the means of securing return of property is as compelling as the need for predeprivation notice, in the circumstances such as those presented in this record. The imposition of a duty to provide this fundamental notice is consistent with the relevant line of Court precedent and merely defines notice in a postdeprivation context, without expanding or creating any new federal due process rights.

The *Parratt-Hudson* line of cases requires that, in cases where there is no need for predeprivation notice and a hearing, due process is satisfied only if a meaningful postdeprivation remedy is available. Notice, most often, will affect the meaningfulness of that postdeprivation remedy. By providing notice of only the seizure of property itself, the Petitioner deprived Respondents of the information necessary to implement the procedure for return of property and, therefore, rendered the process meaningless.

Moreover, a fundamental flaw of the Petitioner's and *Amici's* position is their assumption that there was no impending hearing affecting the disposition of the Respondent's property. This erroneous assumption led to inadequate notice being given to Respondents. The government, once it retained, as opposed to seized, the property, was engaging in nonrandom and authorized conduct which renders the Petitioner's position against notice unsupportable.

The traditional notice test set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and expounded upon in *Mathews v. Eldridge*, 424 U.S. 319 (1976), involves the balancing of the governmental and

private interests. This balance establishes that the notice provided to Respondents was insufficient and favors requiring the Petitioner to correct its form of notice. The burden involved in correcting the notice, which would have avoided the increased risk of erroneous deprivation of property, was minimal. The Petitioner already provided a document entitled "Search Warrant: Notice of Service" at the residence. A simple modification would satisfy due process. Additionally, there were other feasible and customary alternatives available to correct the form of notice chosen.

Reliance on *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978), is appropriate in that the Court addressed the necessity for notice in that case. Notice is a broad due process concept, the discussion of which is relevant in any context. Additionally, since there was an impending hearing looming, and any emergency in retaining the property no longer existed, the *Mathews* balancing test, applied in *Memphis Light*, was appropriately utilized. This court has engaged the *Mathews* balancing test in many types of due process cases, and it remains a useful guide.

None of the California statutes or cases cited by the Petitioner or *Amici* provide adequate notice to Respondents on the record of this case. Respondents were unable to access the procedure for return of property because they were not given the information needed to identify the property before the state court. No statute or case could have provided this factual information. Therefore, the maxim that one is charged with the knowledge of the law, is inapplicable to this case. With regard to the notice of procedures for the return of property, the cases cited in

support of Petitioner's position are irrelevant and distinguishable form the facts as presented in the record.

The notice supplied by the Petitioner is qualitatively inferior to that provided by the federal government and the majority of other states. Fed.R.Crim.P. 41, upon which most state statutes are modeled, requires that the law enforcement authority is to leave a copy of the search warrant at the residence searched. Had Petitioner complied with a similar mandate, it is likely that Respondents would have been able to retrieve their property under the appropriate procedures. The federal statute and similar state statutes betray Petitioner's position. Those agencies have adopted laws which satisfy due process; the notice provided here falls below that standard.

Finally, since due process is flexible and subject to the dictates of each particular situation, Respondents recognize that reasonable minds can differ in balancing the competing interests. However, respectfully, all reasonable minds would conclude that due process requires notice which includes the search warrant number, case name, or case number, the lack of which prevented the Perkins family from obtaining not only a meaningful hearing on their request, but also the actual return of their property. This principled holding should be affirmed by this Court. The requirement that the Petitioner give notice of the identification of the procedure is also supported by the record and Court cases. Without compromising that position, Respondents assert, alternatively, that the court should affirm the holding that the notice was less than

due process required, but does not necessarily require detailed notice of the procedure.

ARGUMENT

I. WHERE PROPERTY IS TAKEN DURING THE EXECUTION OF A SEARCH WARRANT, DUE PROCESS REQUIRES THAT NOTICE TO AN INNOCENT PROPERTY OWNER MUST PROVIDE NOT ONLY NOTICE THAT PROPERTY HAS BEEN SEIZED, BUT ALSO BASIC INFORMATION REQUIRED TO GUARANTEE MEANINGFUL ACCESS TO POSTDEPRIVATION REMEDIES.

Petitioner asserts that due process requires no notice in a postdeprivation hearing case.[4] Pet.Brief at 14-24. Petitioner cites no cases that support this assertion; rather the assertion is supported in the negative, i.e., that all the cases which address "notice" are predeprivation hearing cases, and, therefore, so it is argued, no notice is required in postdeprivation hearing cases. Petitioner is wrong. Notice is a fundamental component of due process regardless of when the hearing occurs. The United States agrees.[5]

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[4] Petitioner states that "all that was required to satisfy procedural due process in this case was the availability of an adequate postdeprivation procedure for the return of seized property." Pet.Brief at 20.

[5] The United States concedes that notice is required in this postdeprivation context. The Solicitor General's brief recognizes that "[t]he Due Process Clause requires notice that is sufficient to make the opportunity for a hearing meaningful. *Mullane*, 339 U.S., at 314." United States Brief at 11.

A. This Court Has Previously Recognized the Need for Notice of Remedies in Postdeprivation Contexts.

In *Schroeder v. City of New York*, 371 U.S. 208 (1962), the City of New York, through its water board, instituted a condemnation proceeding whereby water was to be diverted from a river some 25 miles upstream from the plaintiff's property. The notice of condemnation proceeding was instituted not for a hearing on the right to object to the diversion, but on the City's "intention to make application to such court for appointment of commissioners of appraisal." *Id.* at 209. Under the statute, regardless of the plaintiff's right to appear at the hearing on the appointment of appraisers, a landowner had three years within which to file a claim for damages with the city.

The plaintiff filed the action alleging a due process violation claiming that she did not receive notice of the "condemnation proceedings" and, hence, did not file a claim for damages within the three-year period. The Court held that the posting of notices up and down the river, but not on Plaintiff's property, was inadequate. More importantly, however, was the Court's response to the asserted defense that the Plaintiff had notice of the diversion of the water by the change in volume of the river flow: the Court held that

> knowledge of a change in appearance of the river is far short of *notice* that the city had diverted the river *and that the appellant had a right to be heard on a claim for compensation for damages* resulting from the diversion.

Id. at 214 (emphasis added). Although the statement was in response to an issue regarding notice of the deprivation itself, the Court was clear that notice of the right to be heard on the "claim for compensation" should be included, even though the right to be heard could occur up to three years after the deprivation. Accordingly, the Court held that notice of the deprivation *and notice of the right to be heard is required,* even though the claim need not be filed for three years.

Similarly, in *Bragg v. Weaver*, 251 U.S. 57 (1919), the Court considered whether a condemnation statute that provided for postdeprivation notice and remedies "denie[d] to the owner the due process of law guaranteed by the Fourteenth Amendment." *Id.* at 58. The municipality had taken dirt from a landowner's property to repair an adjacent public highway. The landowner, among other things, contended that the statute was fatally defective, because "the proceedings may be carried from inception to conclusion without any notice to the owner, and therefore without his having an opportunity to [have a hearing]." *Id.* at 61. This Court quoted the statute in question as providing for postdeprivation notice either in person, through the landowner's presence at the compensation hearing, or by written notice thirty days thereafter. Implied in the Court's ruling that the statute was not fatally defective under the Due Process Clause is the assumption that, had the statute not provided for this postdeprivation notice, then the scheme would have been unconstitutional. Accordingly, at least

some deprivations of property, which require no predeprivation hearing, do require postdeprivation notice.[6]

The need for postdeprivation notice here is even more compelling. In a condemnation case, the municipality has the right to take specifically identified property and keep it. In this case, although Petitioner had the right to take property, the property is not specifically identified, and some of the property seized was even not identified in the warrant. Second, the right to keep property seized by eminent domain has long been established. The right to hold property seized pursuant to a warrant, however, is contingent upon a number of factors including whether the municipality appropriately identified the property seized as being within the terms of the warrant and whether the property was, in fact, otherwise related to any criminal activity. Third, in the circumstances presented in the record, Petitioner was put on notice that the property it had taken was, in fact, being erroneously detained. Fourth, if a condemnation case requires notice of a right to a hearing on compensation, then this case, *a fortiori,* requires notice, since here, unlike a condemnation case, the appropriateness of the deprivation itself was still at issue, and, in fact, was conceded by the City to be erroneous.

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[6] Respondents assert that these are not cases which come within a "limited exception" as advanced by the United States, Brief at p.26, since there was ample time within which the aggrieved party could determine her remedies in the postdeprivation time period.

B. In this Context, More Information than Just the Notice of the Seizure Is Required to Satisfy Due Process.

This Court has broadly held that constitutional due process is flexible, demanding particular protections in particular situations. *Mathews v. Eldridge*, 424 U.S., at 334. Put another way, the Court must determine "what process was [the Perkins'] due." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

This Court has recognized that some takings, while not requiring a predeprivation hearing, may still satisfy due process. In those circumstances, the government must provide a meaningful postdeprivation remedy. Those cases involve "either the necessity of quick action by the State or the impracticability of providing any meaningful predeprivation process, when coupled with the availability of some *meaningful* means by which to assess the propriety of the State's action at some time after the initial taking, can satisfy the requirements of procedural due process." *Parratt v. Taylor*, 451 U.S. 527, 539 (1981) (emphasis added).

In addressing the requirements of due proc , however, Petitioner cites to *Parratt* and *Hudson v. Palmer*, 468 U.S. 517 (1984), as support for its position that no notice whatsoever is required. The *Parratt-Hudson* line of cases does not stand for the proposition that notice is not required in a postdeprivation context as the Petitioner asserts. The Petitioner's use of these cases is misplaced, since they never specifically address the issue of notice in a postdeprivation context. However, these cases do indicate that due process is not satisfied in a postdeprivation

context if the government fails to provide a remedy which is "meaningful" in both theory and practice. *Id.* at 533.

A prerequisite, then, to satisfying due process in a postdeprivation case is the existence of a "meaningful" remedy. Very often, however, notice will dictate the meaningfulness of the remedy. In practice, the inadequate notice provided by the Petitioner rendered an otherwise adequate state remedy meaningless. Respondents could not even get into court to have a hearing which, by all accounts, would have been a *pro forma* proceeding to grant the return of property. The search warrant was sealed, there was no case number as no case was filed until February of 1994, there was no listing under the name of Lawrence Perkins or Marcus Marsh; and there was no listing by address. Petitioner had no policy or custom to provide the needed information to the Perkins' family. The only seemingly useful information was the direction to call a number "for further information." This notification proved to be illusory, however, as the officers had no further useful information.

Also misplaced is the Petitioner's argument that the *Mathews v. Eldridge* analysis already has dictated that a search warrant case precludes a predeprivation hearing and has no further application. This argument is off the mark. This case is to be examined not at the time of the initial seizure, but, later, at the time of the retention of the property. At that point, it was not impracticable to provide Respondents with notice of the search warrant number, basic factual information, or of the governmental policies and procedures *vis a vis* the retention of property.

If the prerequisite of *Parratt* is a "meaningful" opportunity for a hearing, then, to the extent that Respondents could not get their property back because of the lack of information in the notice, the *Parratt* line of cases support a constitutional demand for this information to be included in the notice.

Also, the *Parratt-Hudson* line of cases concerned random and unauthorized conduct by the government resulting in the permanent and immediate deprivation of property. Here, the actions of the government were neither. This is a case, not where notice is impracticable because of the random and unauthorized nature of the deprivation, but because of the emergency in taking custody of the property. As such, once the taking has occurred, the emergency no longer exists, but the property is now being retained by the government. Consequently, to the extent that there exists an adequate postdeprivation remedy, the government no longer has an excuse for not providing adequate notice, especially where the notice is critical to insuring the meaningfulness of the procedures provided by the state.

II. THE TRADITIONAL NOTICE TEST SET OUT IN *MULLANE* AND FURTHER DEVELOPED IN *MATHEWS* ESTABLISHES THAT THE NOTICE GIVEN TO RESPONDENTS WAS INSUFFICIENT TO SATISFY DUE PROCESS.

A. The *Mullane* Standard

The starting point for due process analysis has been reiterated by the Court on many occasions. After a court has determined that there has been a deprivation of a protectable interest, the minimum requirement of due

process must be notice and an opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S., at 313. Due process requires that the notice impart information to make the opportunity for a hearing meaningful, regardless of when the hearing is to occur. *Mullane*, 339 U.S., at 314; *Schroeder, id.; Bragg, id.; Hudson, id.* Notice, under the circumstances reflected in the record, is satisfied only when it advises the person that the property has been seized, *and* imparts basic information, or the means to access that information, to enable the individual to employ publicly available laws and the procedures enacted thereunder, *i.e.*, the motion for return of property. J.A. 81. The Court of Appeals' decision recognizes that the meaningfulness of the remedy is dependent on the notice.

Here, Petitioner's notice imparted the following information: On May 21, 1993, Respondents' home was searched and property seized by Petitioner pursuant to a warrant issued by Judge Oki of the Citrus Municipal Court on May 20, 1993; for "further information," call a detective at (818) 814-8510.

While the one-page notice appears to provide information needed to access the remedy, the record reveals the contrary. The notice, after it is distilled, is limited to who took the property and under whose authority. This is "skeletal" information. Even the location whereat to appear to move to get the property back was lacking in the notice. Nevertheless, Perkins tried to fill in the gaps in the notice. He called the number for further information and was eventually told to go to court. At court, Respondents were unable to appear before a judge; their inability to obtain the necessary information prevented

them from getting on calendar to make their request. The record reveals that neither Respondents nor the court (because Respondents did not have the necessary information) could identify the warrant in question. The information that Respondents needed was in the possession of Petitioner but not included in the notice. Without the search warrant number, case name, or case number, the opportunity for a hearing was rendered meaningless.

Further, Petitioner created the illusion that Respondents would be given the necessary information by providing a telephone number to call for further information. This portion of the notice was limited in its meaningfulness. Nevertheless, the ability to access a postdeprivation remedy should not hinge upon the assistance of someone who has an interest in trying to leverage information from the person whose property has been seized.[7] Petitioner's notice requires that the individual do just that – contact the very person whose interest it is to not necessarily provide the information.

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[7] A minority of this Court has suggested that a form notice which provides a telephone number to an adequately staffed information center, might satisfy the notice requirements of due process. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978) (Stevens, J., dissenting). Under the circumstances of this case, however, the phone was not adequately staffed in that the person who answered did not have an interest in providing the information without trying to leverage it. A finding of adequate notice in the leaving of a phone number, would, as stated above, make access to a remedy hinge upon the willingness of a detective to be forthright and not take advantage of his position.

B. *Mathews v. Eldridge*.

Petitioner proposes a purely mechanical analysis for this case in requesting that the Court deny the right to notice in all postdeprivation hearing cases. However, as this court has stated, "[d]ue process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstance." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (internal quotations omitted). As such, the "notice required will vary with the circumstances and conditions." *Schroeder*, 371 U.S., at 212. In evaluating what notice due process requires under the circumstances and conditions of this case, "[t]he balancing of equities that *Mathews v. Eldridge* outlines remains a useful guide in due process cases." *Medina v. California*, 505 U.S. 437, 453 (1992) (O'Connor, J., concurring).[8]

The Court, while sometimes limiting the application of this balancing test, has broadly stated, without strict limitation, that *Mathews* "articulate[s] a three factor test for evaluating procedural due process claims. . . . " *Id.*, at 443. Under *Mathews*, in order to identify "the specific dictates of due process [notice, in this case]," the Court is to consider, in the particular case, (1) the private interest at stake, (2) the risk if an erroneous deprivation along with the value of additional notice, and (3) the burden imposed on the government by the additional notice. *Id.*, at 335.

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[8] *Medina* recognizes that the *Mathews* balancing test has been applied in the resolution of due process issues other than a predeprivation due process case.

1. The Private Interest at Stake

The list of property seized and retained by Petitioner is listed in the Property Receipt. J.A. 84. While the list includes a number of items, the primary items are the $2,469.00 and the family's shotgun. Obviously, the private interest at stake is significant, especially given the fact that the money was saved by a working class family for a trip from Los Angeles to Alabama to visit Mrs. Perkins' mother, a trip, incidentally, that never was able to occur. The private interest in such personal property is undeniably important.

2. The Risk of Erroneous Deprivation and The Probable Value of Additional Procedural Safeguards

There is no question that Respondents had an interest in the property at issue; the proof of ownership was submitted and the detective had no objection to the return of the property. The lack of information in the notice prevented Respondents from getting on calendar for the *pro forma* adjudication of their interest.

It is apparent in the record that the notice did not provide information that would identify under what search warrant or case the property was seized. Notice of the deprivation was provided but not any information that would allow an individual to identify under what warrant the property was held or how to obtain this needed information. The risk, as a general matter, is

substantial if one cannot identify the warrant. The impending specter of an unknown criminal filing, increases the risk of erroneous deprivation substantially, since, without the ability to adjudicate one's interest, the tendency of law enforcement and the courts would be to link the property to the illegal activity of the subject of the search warrant. In the event no criminal filing occurs or is delayed, notice of the procedure for return of property is more critical because of the uncertainty of its status. The criminal court has the power to order the property destroyed or confiscated in the criminal case either after trial or through a plea and sentence bargain. The defendant, in a plea bargain, also has an interest in releasing the property to the government as part of a deal. The risk to Respondents, as evidenced in the record, is no less, given that the Petitioner was seeking to seize firearms and other items related to gang activity. Moreover, without input at the court from Respondents, the money could easily be used as evidence against Marsh or by Marsh, therefore, interfering with Respondents' interest in it.

The increased value of additional procedural safeguards (further notice) in avoiding the risk of loss is substantial in the record. Including in the notice already provided information allowing Respondents to employ the procedural remedy allows for access to the courts for adjudicating their interest, thereby eliminating the risk of an erroneous retention or use in a criminal proceeding. As a general matter, the "value" of the additional notice is not necessarily judged by the success of retrieving the property, but by the providing of notice sufficient to

enable one to obtain a hearing; here, however, Respondents' rights to the property is unquestioned. Further, the additional safeguards are judged as to their reasonableness, which "must be tested with reference to the existence of 'feasible and customary' alternatives to the form of notice chosen." *Green v. Lindsey*, 456 U.S. 444, 454 (1982). Here "feasible and customary" alternatives were available.

(i) Petitioner could leave a copy of the warrant. It is customary among the majority of states and the federal government, pursuant to statutory mandates, to leave a copy of the warrant at the residence searched. United States brief, fn. 1. California's customary practice is inconsistent with the Federal Rules of Criminal Procedure and the bulk of the other 49 states. Providing a copy of the document has been determined to be not only feasible, but also mandatory in these jurisdictions.

(ii) To the extent that Petitioner claims that the search warrant was "sealed" and, therefore, not feasible to leave at the home, there exist additional alternatives. The search warrant can be redacted of information which Petitioner believes may compromise the investigation. The search warrant number and other necessary information can be included on the "Search Warrant: Notice of Service" document.

(iii) Petitioner can notify the court of the officers' belief of the erroneous nature of the retention, so that a hearing would be set up or an order signed returning the property. This would avoid the danger of divulging important information.

(iv) Notice of the procedure or reference to the appropriate Penal Code sections and local rules along with the necessary information would have provided Respondents with a starting point from which to make application to the court. This would have avoided further burden to the Petitioner, by relieving it of providing piecemeal information to Respondents in each returned call.

3. The Burden Imposed on the Government.

Since Petitioner already leaves a document at the location, and, since most every other state in the Union requires the leaving of a copy of the search warrant, the requirement that Petitioner leave notice imparting key information to employ the procedure for the return of the property is clearly minimal. Petitioner need only adopt the procedure employed by the federal government – providing a copy of the warrant. Alternatively, Petitioner would not be required to create any new procedures, only the modifications of existing forms.

The information provided by Petitioner in the notice or search warrant would not burden the government with the necessity of providing legal advice. The form would only need the warrant number, the case number, or the means to identify this information or the warrant, if it is not available or sealed. Giving notice that the Respondent needed to file a written request with the court is not legal advice. No legal judgments need be made in the giving of notice. This Court has demanded in other cases that municipalities provide more notice than that which the Court of Appeals demanded here. Applying these notice

requirements to a postdeprivation context does not transform it into legal advice. The attempts by Petitioner and *Amici* to paint a confusing and burdensome picture of the Petitioner's obligation to provide notice is an overstatement without support in the record. The fundamental due process requirement of notice, as defined by the Ninth Circuit is that Respondents must be given key information and basic directions as to what course to take to retrieve their admittedly wrongfully held property. This basic, fundamental, and rudimentary information allows the aggrieved party to initiate the procedure for the return of property. To assert that this information, somehow, constitutes legal advice to the recipient of the notice illogically expands the parameters of the practice of law. The alleged fear of prosecution for the unauthorized practice of law only magnifies the absurdity of this position.

The suggestion that the notice would be overly burdensome and would "vary from time to time and court to court" and require monitoring of court procedures is unfounded. There is nothing in the record to suggest that there is any variation in the law in California much less among the nation. In fact, the record is to the contrary. California's procedure is governed by state law, not by any local ordinances; uniformity of notice, therefore, would be preserved. Additionally, according to the United States, there exists a tradition, history, and practice among the fifty states and the federal government which is evidence of a constitutional practice. Notice which imparts the basic information necessary to access the property return procedure, therefore, would not vary from court to court. Moreover, the indication is that Rule

41, at least, has not changed since 1917, thereby eliminating the possibility that the procedure would vary from time to time. United States brief at 14. Finally, the substance of the notice is basic enough that there would exist no realistic variations. In fact, only the Petitioner would have to change its notice requirements, by falling into line with the rest of the nation and provide a copy of the warrant, depending on the Court's holding in this case.[9] The substance of the notice is also not so specific as to require the minute detail fancifully envisioned in the briefs, whereby the municipality would have to give notice of everything from the grade of paper to the font-size of the type.

Moreover, this requirement does not expose the municipality to untold liability as *amici* asserts. *Amici* have presented no evidence that such a prediction will occur under the facts which are the basis of the Perkins' claim. This prediction is extremely unlikely. This court has found in other circumstances that due process mandates notice more detailed than the Court of Appeals dictated in this case. There is no proffer of evidence indicating such an overwhelming burden occurring in similar such cases.

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[9] Respondents believe the cases strongly support that due process requires the Petitioner provide information on how to initiate the return procedure. Nevertheless, Respondents are mindful of the Court's desire for restraint. See, Section V, supra.

4. Balancing the *Mathews* Factors.

In weighing these factors, the record shows that the private property interest, personal items taken from a residence, and money saved by the family, is not an insignificant interest. The fact that the money was saved for a family trip to visit Mrs. Perkins' mother in Alabama, gives the interest much more significance.

The burden imposed on Petitioner is quite minimal, since it requires only the modification of an existing notice already left at the location. Petitioner also can leave a copy of the search warrant which also would have provided the information needed by Respondents in accessing the procedure. The only burden to which Petitioner can point is the addition of information in the notice form. This is not a significant burden at all, since the Petitioner provides notice already.

Initially, at a minimum, the search warrant could be provided or the notice should be amended to provide the essential information necessary to invoke the procedure for return of property. This involves the minimal burden of complying with the dictates set forth by the federal government and most other states by requiring that the search warrant be left at the location. Otherwise, Petitioner need only modify the notice to include the search warrant number, the case name or number, or other means of identifying the court file. The notice could easily state that the document can be submitted to the clerk of the court for identification of the court file. This is a minimal burden justified by the value to individuals

in accessing the procedure for a meaningful hearing and to avoid the risk of erroneous deprivation.

The additional text in the "Search Warrant: Notice of Service," would include information to the recipient of the procedure for contesting the seizure, *i.e.*, that the aggrieved party must seek a court order, and provide "any additional information required for initiating that procedure in the appropriate court." Since there exists no indicated variation in the laws, Petitioner need only advise of the need to file a written notice to request the property be returned promptly. Further, there is no indication that these laws have changed at all, such that the municipality would be required to monitor court procedures. This is a mandate which is rationally related to the municipality's obligation to notify an individual of the seizure itself. The burden of adding information about the procedure for obtaining return of the admittedly erroneously retained property is minimal given the uniformity and consistency of the laws over time and place.

The basic foundation and essence of due process is the providing of adequate notice to the person whose property interests are put in jeopardy. *Mathews v. Eldridge*, 424 U.S., at 348. Because they were deprived of the notice of the right to seek return of the property, *and the notice of the means by which to achieve such*, Respondents were prevented from accessing a hearing on their property.

Moreover, this Court has specifically held that "the Due Process Clauses protect civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to

redress grievances." *Logan v. Zimmerman Brush Co.*, 455 U.S., at 429. *Logan* reaffirmed a long line of cases upholding the fundamental nature of this right. In *Boddie v. Connecticut*, 401 U.S. 371 (1971), "the Court established that, at least where interests of basic importance are involved, 'absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard.' " *Logan*, 455 U.S., at 430, fn. 5, citing *Boddie*, 401 U.S., at 377. "[H]aving made access to the courts an entitlement or a necessity, the State may not deprive someone of that access unless the balance of state and private interests favors the government scheme." *Id.* As Justice Blackmun noted, "[t]he Court's cases involving the right of access to court's provides an analogous method of analysis. . . . " *Id.*

Additionally, in *Memphis Light, Gas, & Water Div. v. Craft*, 436 U.S. 1 (1978), this Court dealt with a similar set of circumstances with regard to evaluating the substance of particular notice. While this is a predeprivation case, the Court found that the notice to the customers was insufficient to satisfy Due Process, because it deprived them of a meaningful opportunity for a hearing. As the Court of Appeals quoted,

> [T]he notification procedure, while adequate to apprise the [plaintiffs] of the threat of termination of service, was not "reasonably calculated" to inform them of the availability of "an opportunity to present their objections" to their bills. *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 314 (1950). The purpose of notice under the Due Process Clause is to apprise the effected individual of, and permit adequate preparation for, an impending "hearing." Notice in a case of this kind does not comport with constitutional requirements when it does not advise the customer of the availability of a procedure for protesting a proposed termination of utility service as unjustified. As no such notice was given respondents – despite "good faith efforts" on their part – they were deprived of the notice which was their due.

Memphis Lights, 435 U.S., at 14-15 (footnotes omitted). The Court can set aside the predeprivation aspect of *Memphis Light*, and utilize its thoughtful analysis of notice. The attempts by Petitioner to distinguish *Memphis Light* from this case ignore this court's willingness to utilize the balancing test to determine the dictates of due process.

Additionally, the Petitioners and *Amici* seem to ignore the fact that there was an impending hearing within the meaning of *Mathews*. Specifically, the prosecuting agency charged Marcus Marsh in a criminal proceeding. While in most cases, the criminal action will occur sooner, such an action, at any time, threatens the status of the seized property. This impending hearing necessitates notice to the party whose property could potentially be affected. Also, the *retention* of the property, as opposed to its initial *seizure*, was no longer the subject of an emergency and it was not impracticable for the government to provide notice of a hearing. Even under the Petitioner's limited construction of *Mathews*, the balancing test applies. Since there is no emergency or impracticability, there is no impediment to providing a hearing on the retention. Nevertheless, Respondents do not advocate that *Mathews* requires a hearing, since the state has an

adequate procedure. The *Mathews* balancing factors do, however, dictate that the Petitioner provide notice.

Even without an impending hearing, there appears no logical impediment to bifurcating the Court's discussion in *Memphis Light* as to the adequacy of notice. In the predeprivation hearing cases, notice is critical to guaranteeing the right of an opportunity for a meaningful hearing. Notice, in this case, is also necessary to provide an opportunity for a meaningful hearing. If notice is required in both contexts, the analysis of *Memphis Light* is controlling when judging the adequacy of the notice.

III. NEITHER CALIFORNIA STATUTES NOR CASE LAW PROVIDE SUFFICIENT NOTICE OF THE INFORMATION NECESSARY TO ACCESS THE POSTDEPRIVATION PROCEDURE.

1. Respondents were unable to get their property back because they were not provided with the search warrant number, case name, or case number or how to obtain it. This basic information was needed to access their state remedy under California law. Since the California statutes and case law could never provide the specific factual information needed by Respondents, the statutory notice cases of *North Laramie Land Co. v. Hoffman*, 268 U.S. 276 (1925), *Reetz v. Michigan*, 118 U.S. 505 (1903), and *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944), do not apply.[10]

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[10] "[A]n unfair and irrational exercise of state power cannot be transformed into a rational exercise merely by invoking [the] legal maxim or prescription . . . that each citizen may be charged with knowledge of the law." *Texaco v. Short*, 454 U.S., at 544, 102 S.Ct., at 800 (Brennan, J., dissenting).

Each of the parties in these three cases possessed the basic information to employ the procedures under state law. North Laramie Land Company knew the parcel number of their lot; Reetz had a state license number; and the *Luckett* depositors knew their account numbers. Respondents did not have comparable information; they were not provided the search warrant number, case name, or case number needed to advise the clerk's office or the court. Even if Respondents had been given a hearing, they would have needed this information to identify the property.

2. With regard to the notice of procedures, while California law may provide for an adequate procedure, in this context, statutory notice is simply nonexistent.[11] The cases relied upon to support the contention that the statute provides adequate notice are distinguishable. In *North Laramie Land Co.*, the Court held that "[a] landowner who had notice of the initiation of the proceedings for the opening of the road published in accordance with the statute, which notice as we have seen under the decisions of this court is constitutionally sufficient, would have

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[11] The statute relied upon by Petitioner and Amici does *not* provide instructions regarding any procedure for obtaining a hearing on property. *California Penal Code section* 1536 provides only a jurisdictional basis for the return of property. The statute, unlike those in *North Laramie Land Co.*, *Reetz*, and *Luckett*, gives no notice as to what postdeprivation procedure may be invoked by a property owner. The procedure is set out in case law, and is referred to as a "nonstatutory" motion for return of property. See *People v. Icenogle*, 164 Cal.App.3d, 620, 623, 210 Cal.Rptr. 575 (1985).

experienced no practical difficulty in ascertaining when the board of county commissioners took final action and by filing notice of appeal to the district court within thirty days thereafter, he could have secured the full hearing to which he is constitutionally entitled. Having failed to adopt such procedure, the plaintiff cannot complain of a denial of due process of law." *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 287 (1925). Notice of a hearing, consequently, was already provided and the land company was put on notice that the hearing was to take place; the land company waived its right to complain by not making any effort to take advantage of a procedure already in effect. Furthermore, the Court held that the principle that property owners are charged with knowledge of the laws affecting their property has "special force" only in tax and condemnation cases. *Id.* at 283.

In *Reetz v. Michigan*, 118 U.S. 505, 509 (1903), the Court imputed knowledge of a statute to a doctor, regarding how to appeal the denial of his license to practice medicine, when he had already utilized the statute in filing his initial application. The Court held that "[t]he statute was sufficient notice," and upheld his conviction for practicing medicine without a license. Again, and similar to *North Laramie*, the Court imputed knowledge of a statute to a person whose property was such that the court would expect him to understand that "[s]uch statutes are universally in force and are general in their application, facts of which the land owner [or professional licensee] must take into account in providing for the management of his property [or professional license] and safeguarding his interest in it." *North Laramie*, 268 U.S., at 283.

Such statutory provisions are part and parcel of owning property such as land or a professional license since the ownership necessarily and obviously includes rights, limitations, duties, and other obligations. To the contrary, the owner of personal property would not be expected to have any knowledge of the laws regarding return of property seized pursuant to a search warrant. See also, *Anderson National Bank v. Luckett*, 321 U.S. 233, 237 (1944) (Bank depositor or investor deemed to know that myriad laws and regulations govern use, control, and abandonment of such property).

Thus, in each of these cases, the claimants failed to take advantage of procedures available to them under state law regarding property interests which anyone would expect them to understand existed. Laramie Land Co. bought and held real property; it should understand the general outline of eminent domain procedures. Reetz went to medical school and knew he was required to obtain and maintain a license to practice medicine, his chosen profession. The *Luckett* depositors, who invested their money in banks, should understand that abandonment of their investments may have adverse consequences.

In contrast, the Perkins family possessed personal property in their home, and had no reason to expect that there existed a set of government regulations regarding how to retrieve their property, much less that the government would somehow become involved in its seizure, such that they would be expected to have a generalized knowledge of the non-statutory procedures governing return of seized property.

Moreover, unlike the Perkins family, the claimants in these cases had the necessary procedural information with which to seek action, yet failed to utilize that information. In *North Laramie*, the land company neglected to exercise all of its rights under the statute; in fact, the land company knew that the proceedings were occurring, even obtaining an extension from the board for filing its claim, but failed to act. In *Reetz*, the claimant knew all about the licensing procedures, having been licensed previously and having applied for a renewed license only to be denied. He failed to act on his appeal. In *Anderson*, the claimants abandoned their property altogether. In this case, Respondents did not neglect to exercise their rights, did not fail to act, and did not abandon their property. Respondents did what they were supposed to do but were denied entry to the court, because they were not provided the information needed to employ the procedure for the return of their property.

Finally, Petitioner was put on notice that the property it had seized was not related to any criminal activity. Had the municipality in *North Laramie* recognized that it had wrongfully condemned the land, it would have taken action to undo it. Had the State of Michigan recognized that it had wrongfully denied Reetz his license, it would have taken action to issue him one, *sua sponte*. Had the government realized it had wrongfully forfeited a purportedly abandoned bank account, it would have restored the funds. The idea that the government can come into someone's home, take private property, admit that the property is not related to any crime, and then require the citizen to wade through the mire of non-statutory procedures for return of property without basic information

provided in the notice is repugnant to the Due Process Clause and the Fourth Amendment.

While the Due Process Clause may not require affirmative action on the part of Petitioner, the egregiousness of the retention, and the complications encountered by Respondents in pursuing their remedies magnifies the need for notice *in this case, without reaching out to establish some broad rule of application.*[12]

IV. THE NOTICE SUPPLIED BY PETITIONER BREAKS SHARPLY FROM THE TRADITIONAL FORM OF NOTICE SUPPLIED BY LAW ENFORCEMENT AGENCIES THROUGHOUT THE COUNTRY

The United States argues the fact that all the other states and the federal government provide certain notice is important evidence that due process has been satisfied. By the same token "[e]ach of our cases has recognized, either explicitly or implicitly, that because minimum procedural requirements are a matter of federal law, they are not diminished by the fact that the State may have specified its own procedure that it may deem adequate for determining the preconditions to adverse official action." *Logan v. Zimmerman Brush Co.*, 455 U.S., at 432, citing *Vitek v. Jones*, 445 U.S. 480, 491 (1980) (internal quotes and brackets omitted). There are compelling reasons why this

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[12] Respondent recognizes that some inconvenience to the citizen is acceptable given the interests of law enforcement. However, the circumstances here reveal that Respondents were stymied in their efforts, not just inconvenienced.

evidence is unpersuasive in support of Petitioner's position.

Petitioner gave notice which would *not* have complied with Fed.R.Crim.P. 41(d) or any other similar state statute. Rule 41 requires that the agency "taking property under the warrant shall give to the person from whom or from whose premises the property was taken *a copy of the warrant and* a receipt for the property taken or shall leave the *copy* and receipt at the place from which the property was taken." Fed.R.Crim.P. 41(d).[13] Petitioner did leave a receipt for the property but *not* a copy of the warrant. Had Respondents received a copy of the warrant, Respondents would have had information that would have allowed them to appear at the courthouse and to provide the court clerk with the key information to allow the case to be put on a judge's calendar for resolution. The copy of the warrant has the warrant number listed. J.A. 92. Petitioner's practice is not consistent with the history and practice in the other states and the federal government.

This evidence is, at best, weak because of its dissimilarity to Petitioner's practice, at worst, wholly irrelevant to the point sought to be proved. Conversely, the history and practice of other states and the federal government is evidence of the *unconstitutionality* of Petitioner's notice, since the other statutory schemes are evidence of what does comply with due process.

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[13] The Court will recognize that the majority of the state statues are modeled after the Federal Rule of Criminal Procedure 41.

V. IN THE ALTERNATIVE, SHOULD THE COURT DETERMINE THAT THE NOTICE REQUIREMENTS OF THE COURT OF APPEALS WENT TOO FAR, THE FINDING THAT THE NOTICE WAS INADEQUATE IS PRINCIPLED AND JUSTIFIES THE AFFIRMATION OF THE OPINION WITH MODIFICATIONS TO THE NOTICE REQUIREMENTS

Due process requires "an opportunity . . . [for a hearing] granted at a meaningful time and in a meaningful manner," *Logan v. Zimmerman Brush Co.*, 455 U.S., at 437, "is flexible and calls for such procedural protections as the situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1961). If the Court's balancing of the competing governmental and private interests differs in substance from that of Respondents and the Court believes that due process does not require any notice of the procedures, the Court should affirm the holding of the Court of Appeals as its central holding is fundamentally correct – that "the notice given Perkins did not meet the requirements of due process." Pet.App. A23. At a minimum, due process requires that the notice provide "information required for initiating that procedure in the appropriate court. In circumstances such as those presented by this record, the notice must include the search warrant number, or, if that is not available or the record is sealed, the means of identifying the court file." Pet.App. A22.

The holding of the case, that notice was insufficient, is a principled ruling and finds ample support in the record and case law, as described above. Nevertheless, should the Court determine that notice of the procedures is not required to satisfy due process, this court can and

should, in the alternative, still find that the notice was lacking but limit the procedural notice requirements. The flexibility of due process and the requirement of "meaningfulness" demands affirmation.

CONCLUSION

For the reasons stated herein, Respondents pray that the decision of the Court of Appeals be affirmed in its entirety, or in the alternative, affirmed, but modified, and that they be awarded costs.

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Respectfully submitted,

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